Public Prosecutor v Lim Sooi Booi

HIGH COURT (IPOH) — CRIMINAL TRIAL NO 45-4 OF 2002
BALIA YUSOF JC
28 APRIL 2003

Evidence *— Documentary evidence — Public document — Right of applicant to be supplied with — Whether applicant should be supplied with the post mortem report pursuant to s 76 of the Evidence Act 1950 — Whether the post mortem report could prejudice or compromise the case of the prosecution*

The accused, charged for an offence of murder, made an application for the supply of a post mortem report of the deceased to enable him to instruct his counsel accordingly on the charge preferred against him. The deputy public prosecutor informed the applicant that the prosecution intended to use the said post mortem report as evidence against him and that the same would be tendered in court. The applicant relied mainly on the ground that being a public document, the applicant who had an interest in the said document, was entitled to be supplied with copies of such document by virtue of the provision of s 76 of the Evidence Act 1950. The issue for the determination of the court was whether the applicant if entitled to the supply of the said report would in any way prejudice or compromise the case of the prosecution pursuant to s 399 of the Criminal Procedure Code ('the CPC').

Held, dismissing the application:

(1) After perusing the charge preferred against the applicant, the court was of the view that the same had given clear and sufficient particularization as to the identity of the deceased, the time of the alleged offence and the place where the offence was committed. To go beyond that would be asking for 'the means by which the prosecution proposes to prove the facts alleged in the charge.' Exhibit LSB-4 in the affidavit of the applicant filed in support of his application clearly showed to this court that the prosecution intended to use the said post mortem report as evidence against the applicant. Thus, this court should not exercise its discretion the effect of which would enable an accused person to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents (see p 438F–H); *Public Prosecutor v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v Public Prosecutor* [1985] 2 MLJ 436 followed.

(2) The provision of s 399 of the CPC entitles the applicant to the said report only if the prosecution intends to use the same, and the legislature has deemed it fit that the prosecution must serve a copy of the same not less than ten clear days before the commencement of the trial. Therefore, the prosecution has the discretion whether

or not to use the document and should they decide to do so, the service must be done within the stipulated time. The case against the applicant had not been fixed for hearing yet and by invoking s 399 of the CPC, the prosecution had ample time to supply the document to the applicant should they decide to use the same during the trial. The prosecution would certainly be using the post mortem report in establishing its case against the applicant and it would not be competent for this court to anticipate how the prosecution would proceed with its case. The court held that the applicant was not entitled to be supplied with a copy of the post mortem report and this application should be dismissed (see pp 439D–H, 440C).

[Bahasa Malaysia summary

Tertuduh, yang disabitkan untuk kesalahan membunuh, telah membuat satu permohonan untuk dibekalkan dengan laporan post mortem si mati bagi membolehkan beliau mengarahkan peguam beliau berhubung pertuduhan yang dibuat terhadap beliau. Timbalan pendakwa raya telah memaklumkan pemohon bahawa pihak pendakwa berhasrat untuk menggunakan laporan post mortem tersebut sebagai keterangan terhadap beliau dan yang sama akan ditenderkan di mahkamah. Pemohon bergantung semata-mata atas alasan bahawa oleh kerana ia satu dokumen awam, pemohon yang mempunyai kepentingan dalam dokumen tersebut, berhak untuk dibekalkan dengan salinan dokumen sedemikian menurut peruntukan s 76 Akta Keterangan 1950. Persoalan yang perlu ditentukan oleh mahkamah adalah sama ada pemohon jika berhak untuk dibekalkan dengan laporan tersebut akan dalam apa cara memprejudis atau menjejaskan kes pihak pendakwa menurut s 399 Kanun Acara Jenayah ('KAJ').

Diputuskan, menolak permohonan tersebut:

(1) Setelah meneliti pertuduhan terhadap pemohon, mahkamah berpendapat bahawa pertuduhan tersebut telah dengan jelas memberikan butir-butir yang mencukupi mengenai identiti si mati, masa kesalahan tersebut dilakukan dan tempat ianya berlaku. Untuk mendapatkan butir-butir yang lebih lanjut lagi adalah seperti meminta 'the means by which the prosecution proposes to prove the facts alleged in the charge.' Ekshibit LSB-4 dalam afidavit pemohon yang telah difailkan untuk menyokong permohonan beliau dengan jelas menunjukkan kepada mahkamah ini bahawa pihak pendakwa berhasrat untuk menggunakan laporan post mortem tersebut sebagai keterangan terhadap pemohon. Oleh itu, mahkamah ini tidak patut menggunakan budi bicaranya sehingga menyebabkan seseorang tertuduh boleh mendapat bahan tersebut sebelum perbicaraan

seperti dalam kes penemuan pra-perbicaraan dan pemeriksaan ke atas dokumen-dokumen tersebut (lihat ms 438F–H); *Public Prosecutor v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v Public Prosecutor* [1985] 2 MLJ 436 diikut.

(2) Peruntukan s 399 KAJ memberi hak kepada pemohon untuk mendapatkan laporan tersebut hanya jika pihak pendakwa berhasrat untuk menggunakan yang sama, dan badan perundangan menganggap ia sesuai di mana pihak pendakwa perlu menyampaikan satu salinan yang sama tidak kurang daripada sepuluh hari sebelum perbicaraan bermula. Oleh itu, pihak pendakwa mempunyai budi bicara sama ada atau tidak untuk menggunakan dokumen tersebut dan jika mereka memutuskan untuk berbuat demikian, penyampaian tersebut hendaklah dibuat dalam tempoh yang ditetapkan. Kes terhadap pemohon belum lagi ditetapkan untuk perbicaraan dan dengan menggunakan s 399 KAJ, pihak pendakwa mempunyai masa yang cukup untuk membekalkan kepada pemohon jika mereka memutuskan untuk menggunakan yang sama semasa perbicaraan. Pihak pendakwa akan pasti menggunakan laporan post mortem tersebut untuk membuktikan kesnya terhadap pemohon dan ia tidak kompeten untuk mahkamah ini meramal bagaimana pihak pendakwa akan meneruskan kesnya. Mahkamah memutuskan bahawa pemohon tidak berhak untuk dibekalkan dengan sesalinan laporan post mortem tersebut dan permohonan ini patut ditolak (lihat ms 439D–H, 440C).]

Notes

For cases on public document, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1100–1109.

Cases referred to

Gopinathan a/l Subramaniam v Timbalan Menteri Dalam Negeri & Ors [2000] 1 MLJ 65 (refd)

PP v Ramasami a/l Simmathri & Ors and another application [2001] 4 MLJ 412 (refd)

PP v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v PP [1985] 2 MLJ 436 (folld)

PP v Um Uan Chen [1990] 2 CLJ 1020 (refd)

Saw Thean Teik v Regina [1953] MLJ 124 (refd)

Toh Kong Joo v Penguasa Perubatan Hospital Sultanah Aminah, Johor Bahru [1990] 2 MLJ 235 (refd)

Legislation referred to

Criminal Procedure Code ss 51, 152, 153, 154, 399
Evidence Act 1950 ss 74, 76

Chew Soo Ho (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

M Saravanan (*S Muthu & Co*) for the accused.

Balia Yusof JC: This is an application made by the accused person, who has been charged for an offence of murder for the supply of a post mortem report of the deceased person. Through an affidavit-in-support of the application deposed by the accused person, he was informed by the deputy public prosecutor that the prosecution intends to use the said post mortem report as evidence against him and that the same will be tendered in court after the pathologist has given his evidence. The applicant contends that he needs to know the cause of death and to enable him to instruct his counsel accordingly on the charge preferred against him. It is further contended that facing a capital punishment, he ought to be given every latitude to defend himself and that the supply of the said report will not in any way prejudice or compromise the case of the prosecution. Further, in support of his arguments, counsel for the applicant relies mainly on the ground that being a public document, the applicant who has an interest in the said document, is entitled to be supplied with copies of such document. In support of that argument, learned counsel for the applicant relied on the provision of s 76 of the Evidence Act 1950 ('the Act') which provides as follows:

> Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate, written at the foot of the copy, that it is a true copy of the document or part thereof, as the case may be, and the certificate shall be dated and subscribed by the officer with his name and his official title, and shall be sealed whenever the officer is authorized by law to make use of a seal, and the copies so certified shall be called certified copies.

A number of authorities has been cited by the learned counsel for the applicant to support his contention that the post mortem report requested for is a public document (see *Toh Kong Joo v Penguasa Perubatan Hospital Sultanah Aminah, Johor Bahru* [1990] 2 MLJ 235, *Gopinathan a/l Subramaniam v Timbalan Menteri Dalam Negeri & Ors* [2000] 1 MLJ 65) and I have no hesitation in agreeing with the learned counsel that the post mortem report is a public document within the meaning of s 74 of the Act. It is to be noted that in the wording of s 76 of the Act, a person becomes entitled to a certified copy of a public document if he has a right to inspect it. In considering whether a person has a right to inspect a public document it has to be shown that he has an interest in such document and the inspection is necessary for the protection of his own interest.

In *Anthony Gomez v Ketua Polis Daerah Kuantan* [1977] 2 MLJ 24, Suffian LP referred to the decision of the full bench of the Madras High Court in the case of *State of Madras v G Krishnan* AIR 1961 Mad 92 where Ramachandran Iyer J said at p 96:

> Section 76 entitles a person who has a right to inspect a public document, to a certified copy thereof. The section however does not specify the persons who would be entitled to inspect a public document. But judicial decisions have

A long ago settled that question. It has been held that the right to inspect a public document is correlated to the interest which the person who seeks inspection in the document; a mere curiosity or even an interest in some other matter which could perhaps be better served by the inspection, would not be sufficient.

B (See also *Toh Kong Joo v Penguasa Perubatan Hospital Sultanah Aminah, Johore Bahru, Haji Abdul Ghani bin Ishak v Public Prosecutor* [1980] 2 MLJ 196, *Khoo Siew Bee & Anor v Ketua Polis, Kuala Lumpur* [1979] 2 MLJ 49.)

In my view, the granting of the order sought for by the applicant in the instant case involves not only with the construction of s 76 of the Act but C also involves the exercise of discretion as provided in s 51 of the Criminal Procedure Code ('the CPC'). For convenience, the said section is reproduced which reads as follows:

(i) Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary D or desirable for the purpose of any investigation, inquiry, trial or other proceeding under this code by or before such Court or officer such court may issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order.

E (ii) Any person required under this section merely to produce any property or document shall be deemed to have complied with the requisition if he causes such property or document to be produced instead of attending personally to produce the same.

(iii) Nothing in this section shall be deemed to affect the provisions of any law relating to evidence for the time being in force or to apply to any postal F article, telegram or other document in the custody of the postal or telegraph authorities.

The application of the abovementioned section has been exhaustively dealt with by the Supreme Court in the case of *Public Prosecutor v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v Public Prosecutor* [1985] 2 MLJ 436 G where Hashim Yeop A Sani SCJ at p 438 said the following:

> Section 51 of the Criminal Procedure Code is a general provision to be invoked at any stage of an inquiry, investigation or trial or other proceeding under the Code. From the language it is plain that that section enables the court or police officer (as the case may be) if it or he considers that the production of any document or material is necessary or desirable, to issue a H summons (in the case of the Court) or a written order (in the case of the police officer) to the person in whose possession or power the material or document is believed to be requiring such person to attend and produce the material or document at the time and place as stated in the summons or written order.

Further down in his Lordship's judgment at p 439, it was stated:

I > In exercising its discretion under s 51(i) of the Criminal Procedure Code the court has to consider the justice of the case and at what stage of the proceeding the application is made.

Where the court is asked to exercise its discretion under s 51 of the Criminal Procedure Code before the commencement of trial the court must have regard to the provisions of ss 152, 153 and 154 of the Criminal Procedure Code relating to the framing of the charge. There is clearly a specific duty imposed on the prosecution to particularize the charge sufficiently so as to give adequate notice to the accused person. The entitlement of the accused under s 51 of the Criminal Procedure Code to any document or copies of document or other material in the possession of the prosecution is entirely at the discretion of the Court having regard to the justice of the case. The discretion should not however be exercised so as to enable the accused to gain access to materials before the trial as in the case of pre trial discovery and inspection of documents in a civil proceeding. The accused in a criminal trial should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. So long as that requirement is satisfied the law is satisfied. The principle of justice was in fact emphasized by Hepworth J in *Public Prosecutor v Teoh Choon Teck* [1963] MLJ 34 at p 35 where he said:

> 'If there be anyone principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as best he may.'

The qualification, however, is also stated by the learned judge in the same page with which we respectfully agree:

> 'It will be observed that nowhere do ss 162, 163 and 164 say that the accused person is entitled to know the means by which the prosecution proposes to prove the facts alleged in the charge.'

Turning to the facts and circumstances of the application before me, it is clear that the application is made before the commencement of the trial. The case against the applicant has been fixed for hearing sometime in July 2003. Having regard to ss 152, 153 and 154 of the CPC, I am of the view that, after perusing the charge preferred against the applicant, the same has given clear and sufficient particularization as to the identity of the deceased, the time of the alleged offence and the place where the offence is committed. To go beyond that would be in my view, to borrow the words of Hepsworth J, to be asking for 'the means by which the prosecution proposes to prove the facts alleged in the charge'. Exhibit LSB-4 in the affidavit of the applicant filed in support of his application clearly demonstrates to this court that the prosecution intends to use the said post mortem report as evidence against the applicant and on the authority of the case above cited, this court should not exercise its discretion the effect of which would enable an accused person to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents. I further observe that the Supreme Court in answering the question posed, as to whether a person accused of an offence have a right to apply for and obtain an order under s 51 of the CPC to inspect and make copies of documents in the possession of the prosecution in connection with or in respect of such offence has affirmatively stated that:

> ... an accused person has a right to apply for a summons under s 51 of the Criminal Procedure Code but the issue of the summons is at the discretion of

> the court before which the enquiry or trial is heard or pending. Where the application is made before the commencement of enquiry or trial as a general rule the documents or materials must be documents or materials specified or referred to in the charge.

That is the general rule. The applicant in the instant case has not demonstrated to this court whether his case comes under this general rule or otherwise. The burden lies on him and he must discharge that burden in order to pursuade this court to exercise its discretion under the said provision.

The learned deputy public prosecutor has submitted that the post mortem report is evidence under s 399 of the CPC and as such its production is governed by that provision. It is trite law that when a witness whose report is admissible under the CPC is called to give oral evidence, his report should only be used, if at all, to refresh his memory or corroborate the oral evidence (see *Saw Thean Teik v Regina* [1953] MLJ 124, *Public Prosecutor v Um Uan Chen* [1990] 2 CLJ 1020).

By virtue of the provision in s 399 of the CPC, the public prosecutor is obliged to serve a copy of the post mortem report on the applicant should they intend to use the document not less than ten clear days before the commencement of the trial. It is crystal clear that the provision of s 399 of the CPC entitles the applicant to the said report only if the prosecution intends to use the same, and the legislature has deemed it fit that the prosecution must serve a copy of the same not less than ten clear days before the commencement of the trial. That simply means that the prosecution has the discretion whether or not to use the document and should they decide to do so, the service must be done within the stipulated time. The case against the applicant has not been fixed for hearing yet and by invoking s 399 of the CPC, the prosecution has ample time to supply the document to the applicant should they decide to use the same during the trial. Repeating the words of Hashim Yeop A Sani SCJ in *Public Prosecutor v Raymond Chia Kim Chwee & Anor* at p 439:

> If the discretion is to be exercised before the commencement of trial the court cannot anticipate how the prosecution will proceed. In other words the court would not be justified to direct the prosecution to deliver to the accused all documents taken from him for that will not be a correct exercise of discretion under s 51 of the Criminal Procedure Code.

I feel constrained by the abovementioned passage to exercise my discretion in the instant case. One way or the other, the prosecution will certainly be using the post mortem report in establishing its case against the applicant and it would not be competent for this court to anticipate how the prosecution will proceed with its case.

Finally, in considering an application for various documents by the defence, the learned judicial commissioner in *Public Prosecutor v Ramasami all Simmathri & Ors and another application* [2001] 4 MLJ 412 at p 417 says:

> In my view, s 399, which is both permissive (because the word 'may') and mandatory (because the prerequisite for prior service of the reports) in nature, limits the discretion of the court under s 51(1) of the same Code in that if the

prosecution does not wish to tender the reports as part of the prosecution's case, the hands of the judge are tied because these reports no longer form part of the evidence for the prosecution. A fortiori, it becomes unnecessary or undesirable for the reports to be produced at this stage of the trial since their production serves no purpose to the trial at this stage. Consequently, s 51(1) of the CPC cannot be invoked by the defence to apply to the court to order their production. If invoked, the court will refuse to issue the summons sought for. This is because the words 'necessary or desirable for the purposes of any ... trial' in s 51(1) qualify the preceding words 'Where ever any court ... considers that the production of any ... documents is ...'.

In refusing the application for the various reports including post mortem reports and certain other expert reports, the court in the above said case held that it felt constrained by the provisions of s 399 of the CPC which override and prevail over the common law that has been held by the courts to apply by virtue of ss 74 and 76 of the Act. Likewise, I feel the same with the application before me and in conclusion, I hold that the applicant is not entitled to be supplied with a copy of the post mortem report and this application is hereby dismissed.

Application dismissed.

Reported by Ezatul Zuria Azhari